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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 870

STANLEY TAYLOR and EVELYN FLYNN,
Petitioners,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

STANLEY W. TAYLOR,
1201 Fulton Street,
San Francisco 17, Calif.,
Petitioner in Propria Persona.

EVELYN FLYNN,
530 Larkin Street,
San Francisco, Calif.,
Petitioner in Propria Persona.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Harlan Fisk Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Stanley W. Taylor and Evelyn Flynn, petitioners, pray that a writ of certiorari issue to review the decree or judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the cause entitled *Stanley Taylor and Evelyn Flynn v. Chester Bowles, Administrator, Office of Price Administration,* No. 10776, which decree was entered in said cause on December 17, 1945.

Petitioners file herewith a duly certified Transcript of Record in Two Volumes of said cause as the same appears of record in said court (Certified Tr., Vol. II, p. 155).

In support hereof your petitioners respectfully represent as follows:

OPINION AND PROCEEDINGS BELOW

The opinion of the Circuit Court is set forth in the Transcript of Record, Volume II, pages 149 to 152, and the Decree or Judgment of the court dismissing the appeal is set forth on page 153 of said Volume II of said Transcript. Subsequent to such opinion and decree a Petition for Rehearing was entertained and denied by the court (Tr., Vol. II, p. 154).

SUMMARY AND STATEMENT OF THE MATTER INVOLVED

SUMMARY

This petition seeks review of a decree of the Circuit Court which holds that a contempt order entered against petitioners by the District Court is not appealable.

The order in question was entered by the District Court on February 1, 1944, nearly eleven months after the final order in the permanent injunction or "main action", which order was entered March 6, 1943. The proceedings and order on contempt all took place after appeal was taken in the main action and while that appeal was pending.

The contempt order placed a new construction upon the injunction, directly opposed to the construction previously placed upon such injunction by specific findings and ruling of said District Court, which said ruling and findings appeared of record on appeal from the judgment in the main action.

The questions raised by the contempt order were not, therefore, and could not have been considered by the Circuit Court in its review of the judgment in the main action. The Circuit Court in its ruling dismissing the appeal from the contempt order states, however—

> "A remedial or civil contempt order directed against a party litigant is deemed interlocutory and not a final order, and is reviewable only on appeal from the final decree in the main action. * * * The judgment of contempt was remedial, therefore civil and interlocutory, and not final for the purposes of appeal to this court." (Tr., Vol. II, pp. 151-152.)

The effect of the contempt order was to set aside contracts involving persons not parties to the action contrary to the previous ruling referred to above which held such contract to be valid and not a violation of the injunction.

The contempt order was based upon findings which sought to effect jurisdiction over such contracts by finding that the payments made on account of the purchase of property covered by such contracts "were in fact rent". It is the contention of petitioners on appeal that such finding is contrary to law and to the evidence and that petitioners did not violate either the injunc-

tion or the Regulation in the respect charged (Tr., Vol. II, pp. 133-136).

The statement of the Circuit Court in its opinion as to, "The object of the order", and what the order in question directs the appellants to do, presents a misleading and improper picture of the actual import and effect of such order.

STATEMENT OF THE CASE

Appeal was taken by petitioners to the Circuit Court from a final order entered in the District Court on February 1, 1944, which said order adjudged said petitioners to be in contempt of court for alleged violation of a permanent injunction previously issued by said District Court by final order made and entered on March 6, 1943 (Tr., Vol. II, pp. 21, 22, 15-21).

All proceedings on the contempt order and the order itself took place after appeal had been taken by petitioners from the judgment in the main action and while said appeal from the main action was pending (Tr., Vol. I, pp. 237-239, 95-98; Vol. II, pp. 8-13; see footnote (1)).

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(1) Appeal was taken from the final order in the main action on June 3, 1943 (Tr., Vol. I, p. 107) and the judgment of the Circuit Court on said appeal was entered January 17, 1945 (*Taylor et al. v. Bowles*, 147 F.(2d) 824). Appeal is now pending from the judgment of the Circuit Court in *Taylor et al. v. Bowles*, supra, on constitutional grounds pursuant to Protest MR 28-31-P, originally filed with respondent on August 1, 1944 (Tr., Vol. II, pp. 142-143, parts I and II). The said Protest MR 28-31-P was denied by the administrator, respondent herein, on November 2, 1945, and complaint was filed in the United States Emergency Court of Appeals in said matter on December 3, 1945, where the cause is now pending, entitled *Stanley W. Taylor, complainant, v. Chester Bowles, Price Administrator, Respondent*, No. 279 (E.C.A.).

The contempt order appealed from was based upon findings that:

> "* * * transactions whereby the apartments were purportedly rented unfurnished and the furniture sold to the tenants under conditional sales contracts were and are evasions of said Rent Regulation for Housing in violation of section 9 thereof."

and upon the "finding" that charges made on the purchase price of said furniture:

> "were in fact rent subject to said Rent Regulation for Housing and subject to the terms of said injunction * * *." (Tr., Vol. II, pp. 18-19, part 5.)

The above findings were directly opposed to and contrary to a previous ruling made by the court concerning an identical transaction, wherein the same court held that such transaction did not constitute a violation of the injunction (Tr., Vol. I, pp. 102-107; Vol. II, pp. 4-7, 69-127, 46-64).

The previous ruling, supra, which is set forth in full in both volumes of the Transcript (Vol. I, pp. 102-107 and Vol. II, pp. 2-7) constituted the construction placed upon the injunction by the court at the time the appeal therefrom was being perfected. That construction was before the Circuit Court when the injunction order was affirmed by the Circuit Court in *Taylor et al. v. Bowles,* 147 F.(2d) 824 (Tr., Vol. I, pp. 1, 104-107). There was nothing in the opinion of the court in *Taylor et al. v. Bowles,* supra, to indicate that in its affirmation of the injunction it took cognizance

of the new construction placed upon the injunction by the District Court after appeal was taken.

The effect of the contempt order was to set aside contracts concerning the purchase of furniture by persons not parties to the action and to require petitioners to refund purchase money to such purchasers. The order did not, however, reciprocally require the purchasers to deliver up possession of the furniture to petitioner Evelyn Flynn, from whom they obtained such furniture by purchase under written contract (Tr., Vol. II, pp. 15-21, 68-127). As heretofore set forth, this ruling was contrary to the previous ruling of the court which held a similar transaction to be valid (Tr., Vol. I, pp. 104-107; Vol. II, pp. 4-7).

Upon appeal to the Circuit Court the said court held the contempt order not appealable on the grounds set forth in the Summary. From the foregoing and the entire record (Vol. II, pp. 1-155) it is clear that the contempt order involves questions and issues to be determined on their merits which are not adequately treated by the opinion of the Circuit Court herein, which said opinion treats the whole matter as a simple overcharge of rent (Tr., Vol. II, pp. 150, 152).

STATEMENT OF BASIS OF JURISDICTION

The decree or judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered December 17, 1945 (Tr., Vol. II, p. 153). Petition for rehearing was duly filed within the time allowed by rule of the court and said petition was entertained by the court and denied on January 16, 1946 (Tr., Vol. II, p. 154). The statutory provision believed to sus-

tain the jurisdiction of this Court is Section 240(a) of the Judicial Code of the United States, as amended (28 U.S.C.A., §347). The time within which a petition for writ of certiorari may be filed is fixed by statute as "within three months" after the decree became final by the denial of petition for rehearing on January 16, 1946, as aforesaid. Section 8, Act of February 13, 1925 [28 U.S.C.A., §350].

QUESTIONS PRESENTED

(1) Whether a judgment or order against parties in a suit in equity, for a civil contempt committed after the decree, is reviewable by appeal.

(2) Whether an order in a civil contempt case involving transactions which took place after the decree in the main action, and which raises new points of law which were not passed upon in the original judgment in the main action or in the appeal therefrom, is reviewable by appeal.

(3) Whether an order as described in (1) and (2) above is final for purposes of appeal when it terminates the litigation on the merits and leaves nothing further to be done than to pay the sums of money directed in said order or to commit the contemnors to jail until they have complied therewith, reserving to the court only the power to make other orders for the purpose of enforcing the terms of said order.

(4) Whether the Circuit Court had jurisdiction to review on appeal the contempt order of the District Court dated February 1, 1944, adjudging petitioners in contempt for violation of a permanent injunction entered March 6, 1943.

REASONS RELIED ON FOR GRANTING THE WRIT

(1) Certiorari should be granted because of conflict between the decision of the court below and decisions of other Circuit Courts on the same matter.

Cases in which it is held that such orders are appealable include:

Clay v. Waters, 178 Fed. 385, 392 (C.C.A. 8, 1910);

Perfection Cooler Co. v. Rotax Co., 296 Fed. 465 (C.C.A. 2, 1924);

International Silver Co. v. Oneida Community, 93 F.(2d) 437, 441 (C.C.A. 2, 1937).

Clay v. Waters, supra, distinguished between those cases where the civil contempt was committed before the final decree and those in which the contempt was committed after the decree. In the first instance a judgment on contempt was held to be reviewable by appeal from the main decree only, but where the contempt was committed *after* the decree the contempt order is held to be reviewable by appeal without regard to the appeal or disposition of the final decree in the main action. *Clay v. Waters,* supra, has been followed and cited by numerous other cases, and does not appear to have been overruled until by the decision of the court below in the instant case.

(2) Certiorari should be granted because the decision below has decided the question involved in a way probably in conflict with applicable decisions of this Honorable Court.

The court below cites the Supreme Court case of *Fox v. Capital Co.,* 299 U.S. 105, in support of its de-

cision. However, an examination of said case discloses a wide divergence in the type and character of the matter involved. Also the ruling taken from *Fox v. Capital Co.*, supra, is one cited in that case from *Doyle v. London Guarantee Co.*, 204 U.S. 599, 605, 607, 51 L.Ed. 641, in which the rule given applied to an order punishing for contempt, which order is made *in the progress of the case,* holding such order to be interlocutory and to be reviewed only upon appeal from a final decree in the case.

In *Berman v. U. S.,* 302 U.S. 211, this Honorable Court stated:

> "In criminal cases, *as well as civil,* the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined'." Citing:
>
> *St. Louis, I. M. & S. R. Co. v. Southern Express Co.,* 108 U.S. 24, 28;
>
> *U. S. v. Pile,* 130 U.S. 280, 283;
>
> *Heike v. U. S.,* 217 U.S. 423, 429.

(3) Certiorari should be granted because the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the lower court, as to call for an exercise of this Honorable Court's power of supervision.

(a) In the instant case an examination of those portions of the Transcript hereinbefore referred to discloses that petitioners have been held in contempt for pursuing a course of action specifically approved

in a prior decision of the court (see Summary and Statement of the Case). The stipulation of Mr. Dunlap, counsel for respondent in the District Court, which stipulation appears on page 126 of Volume II of the Transcript herein, discloses the arbitrary manner in which petitioner Flynn's rights have been disregarded both by respondent and the District Court.

(b) It appears to petitioners on advice of counsel and after careful study of the matters involved, that the decision of the Circuit Court in the instant case is motivated either by prejudice or by reluctance to review a case which, if reviewed, must result in a reversal of the District Court and the Administrator, respondent herein. It is to be noted in this respect that even Ninth Circuit cases cited by the court do not sustain the decision.

In *Fenton v. Walling, Smith v. Same,* 9 Cir., 139 F.(2d) 608, cited by the court in its opinion, the court held that orders against Fenton and Smith were appealable and denied a motion to dismiss on the ground that:

> "unless they can obtain a review of the orders now they will have no right of review at all." (p. 610)

The court abrogated and ignored that principle of law in its decision in the instant case.

In *Dickinson v. Rinke,* 2 Cir., 132 F.(2d) 884, cited by the court in its opinion, it was held that:

> "Because an appeal had been taken in the main action, *the District Court was without jurisdiction to enter the order* * * *."

referring to a contempt order issued while such appeal was pending, as was the order in the instant case. In support of such ruling the court in *Dickinson v. Rinke,* supra, cited:

Berman v. U. S., hereinbefore cited, 302 U.S. 211, 214, 82 L.Ed. 204;

Draper v. Davis, 102 U.S. 370, 26 L.Ed. 121;

U. S. v. Radice, 2 Cir., 40 F.(2d) 445, 446;

and

Rodgers v. Consolidated Rock Products Co., 9 Cir., 114 F.(2d) 108.

While the question of whether the District Court in the instant case had jurisdiction to issue the contempt order appealed from is one which should properly be considered when the case is decided on the merits, the existence of such a possibility emphasizes the necessity and propriety of a right of appeal.

(c) The instant case is one of a series of cases and correlated litigation between petitioners and respondent since rent control was first imposed in the San Francisco area in 1942. As disclosed in the Transcript, Vol. II, pp. 142-144, petitioner Taylor is now seeking adjudication of the validity of two previous judgments of the Circuit Court in the cases entitled *Taylor v. U. S.,* 142 F.(2d) 808, and *Taylor et al. v. Bowles,* 147 F.(2d) 824. Such adjudication is being sought on constitutional grounds pursuant to Protest MR 28-31-P, and the cause is now pending before the United States Emergency Court of Appeals where it is desig-

nated and entitled *Taylor v. Bowles,* No. 279 (see footnote (1) under Statement of the Case).

Petitioners on September 6, 1945, filed a charge of prejudice before the Circuit Court, on grounds then and there specified, and based upon the conduct and opinions of the court in *Taylor v. U. S.* and *Taylor et al. v. Bowles,* supra, such charge being supported by affidavit of petitioner Stanley W. Taylor (Tr., Vol. II, pp. 143-146).

Petitioners moved the court to continue the case and extend the time for filing briefs therein until after disposition of constitutional issues controlling the case, which issues were then before respondent pursuant to Protest MR 28-31-P. Petitioners asked in the alternative that the case be certified to the Supreme Court (Tr., Vol. II, pp. 141-146). The motion was denied (Tr., Vol. II, pp. 146-147). However, on oral argument on said motion the court suggested to counsel for respondent that the order of the District Court might not be an appealable order. Upon such suggestion from the court, the Motion to Dismiss Appeal was subsequently filed by respondent and thereafter granted by the court (Tr., Vol. II, pp. 147-153).

Petitioners do not believe that the conduct hereinbefore described, or the opinion of the court, is that of an impartial court.

CONCLUSION

The writ should be granted.

Dated, San Francisco, California, February 15, 1946.

Respectfully submitted,

STANLEY W. TAYLOR,
1201 Fulton Street,
San Francisco 17, Calif.,
Petitioner in Propria Persona.

EVELYN FLYNN,
530 Larkin Street,
San Francisco, Calif.,
Petitioner in Propria Persona.

Due service and receipt of a copy of the within is hereby admitted this_____day of February, 1946.

_____

_____

Attorney for Respondent

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CITATIONS

689347—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 870

STANLEY TAYLOR AND EVELYN FLYNN, PETITIONERS

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. Its order appears at pp. 15–21 of volume II of the record. The opinion of the Circuit Court of Appeals has not yet been reported but is set forth at pp. 149–152 of volume II of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 17, 1945 (R. II, p. 153). A petition for rehearing was denied January 16, 1946 (R. 154). The petition for a writ of certiorari was filed on February 19, 1946. The jurisdiction of this Court is invoked under section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an order entered in civil contempt proceedings instituted for violations of a final injunction decree [1] is an appealable order where the order imposes no punishment but merely directs the defendant to correct and undo the violations under pain of being punished for contempt if he fails to comply with the order within a specified period.

STATUTE INVOLVED

Section 128 of the Judicial Code (28 U. S. C. 225) provides in pertinent part as follows:

> *Appellate jurisdiction*—(a) *Review of final decisions.*
>
> The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.
>
> * * * * *
>
> (b) *Review of interlocutory orders or decrees of district courts.*
>
> The circuit court of appeals shall also have appellate jurisdiction—
>
> First. To review the interlocutory orders or decrees of the district courts * * *

[1] In this case an appeal had been taken from the injunction decree and was afterward determined adversely to the appellant, petitioner here. See Pet., p. 4, n. 1. The appeal did not operate as a stay.

which are specified in section 227 of this title [relating to interlocutory injunctions and decrees relating to receiverships].

* * * * *

STATEMENT

On March 6, 1943 at the suit of the Price Administrator the District Court issued a permanent injunction restraining the petitioners from demanding or receiving rents in excess of those prescribed by Maximum Rent Regulation No. 28 (7 F. R. 4913) and from otherwise violating that regulation (R. I, p. 95). On December 13, 1943 the Price Administrator filed a motion to have the petitioners adjudged in civil contempt for having violated the injunction at various times subsequent to July 30, 1943 (R. II, p. 8). The court, after hearing, found that petitioners had violated the injunction by demanding and receiving rents in excess of those permitted by the Maximum Rent Regulation and entered an order on February 1, 1944 directing petitioners to reduce immediately all rents to amounts not exceeding the maximum rents permitted by the regulation and within ten days to refund all amounts collected in excess of such maximum rents and to furnish proof before the court on March 31, 1944 of compliance with the order (R. II, p. 15). The order recited that the court reserved "the power to commit said defendants to jail until they comply with the terms of this order if it appears that they have not fully complied with the terms of this order

within the time" therein specified. By the same order, a fine of $500 was imposed on petitioner Stanley W. Taylor to reimburse the Price Administrator for the cost of prosecuting the contempt proceedings, subject to the condition that if the petitioner complied with the injunction for a period of sixty days the fine would be remitted. The fine was remitted on April 13, 1944 (R. II, p. 150).

From this order the petitioners appealed to the Circuit Court of Appeals (R. II, pp. 21, 22). That court on motion of the Price Administrator (R. II, p. 147) dismissed the appeal on the ground that the order was not appealable (R. II, p. 149).

ARGUMENT

The only question presented by the petition is whether the order from which petitioners endeavored to appeal to the court below is an appealable order. The court below correctly held that it is not.

1. It may be conceded that a final order, entered in civil contempt proceedings after the judgment in the main cause has become final, is an appealable order, as has been held or stated by several circuit courts of appeals. *Clay* v. *Waters,* 178 Fed. 385, 392 (C. C. A. 8th); *Enoch Morgan's Sons Co.* v. *Gibson,* 122 Fed. 420 (C. C. A. 8th); and see *International Silver Co.* v. *Oneida Community,* 93 F. 2d 437 (C. C. A. 2d). Compare, *Parker* v. *United States,* 153 F. 2d 66 (C. C. A. 1st). The respond-

ent does not question the correctness of these decisions.[2]

The order in the present case, however, is not of the same variety, and there is therefore no conflict of decisions. The only statute under which the jurisdiction of the court below could conceivably have been invoked is Section 128 of the Judicial Code (28 U. S. C. 225). Under that section only final decisions are appealable. The order involved in the present case is not such a decision. It directs the reduction of rents and the refunding of overcharges and, so far as here pertinent, merely "reserves the power to commit said defendants to jail until they comply with the terms of this order if it appears that they have not fully complied with the terms of this order within the time specified" (R. II, p. 20). An order thus adjudging a contempt but reserving final punitive or remedial action with respect to the contempt is not a final order. *In re Eskay,* 122 F. 2d 819, 824 (C. C. A. 3d). It does "no more than to interpret the prior injunction" and to direct further steps for its enforcement. *In-*

[2] An order adjudging one in civil contempt, entered before judgment in the main cause, is interlocutory and therefore not appealable, *Fox* v. *Capital Co.*, 299 U. S. 105; *Perfection Cooler Co.* v. *Rotax Co.*, 296 Fed. 464 (C. C .A. 2d). But civil contempt proceedings instituted after the judgment in the main cause has become final seem to be independent proceedings so as to render the final order therein appealable. Compare, *Cobbledick* v. *United States*, 309 U. S. 323 at pp. 328–329.

ternational Silver Co. v. *Oneida Community, supra,* at p. 441.

2. It is true that the order also imposed a fine of $500 on petitioner Stanley W. Taylor subject to the condition that if he complied with the order within sixty days the fine would be remitted (R. II, pp. 20–21). But as the court below observed (R. 150), even if such an order might be deemed final, "any question with reference to this assessment is now moot as the assessment was remitted to appellant April 13, 1944."

CONCLUSION

The order which petitioners sought to have reviewed by the court below was clearly not appealable and the court below correctly so held. There is no conflict of decisions and no reason exists for granting a writ of certiorari.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

MILTON KLEIN,
Director, Litigation Division,

DAVID LONDON,
Chief, Appellate Branch,

ALBERT DREYER,
Chief, Trial Litigation Branch,
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APRIL 1946.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 870

STANLEY TAYLOR and EVELYN FLYNN,
Petitioners,

vs.

PAUL A. PORTER, Administrator, Office of Price Administration,
Respondent.

Reply Brief for Petitioners

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

PRELIMINARY STATEMENT

Respondent concedes that a final order, entered in civil contempt proceedings after judgment in the main cause has become final, is an appealable order (Br. p. 4).

Respondent contends, however, that the order in the instant case is not final. This contention is not supported by the facts or by the cases cited by Respondent, and we believe it to be clearly erroneous and contrary to the authorities cited in our Petition.

I.

REPLY TO POINTS RAISED IN OPPOSITION

In the case entitled *In re Eskay,* 122 F.(2d) 819 (C.C.A. 3rd), one of the two cases cited by respondent in opposition, we find no relevancy to the instant case.

In re Eskay, supra, holds that a *criminal contempt* in which no sentence has been passed is not final for purposes of appeal. With this conclusion we agree, but it has no bearing on the instant case. The instant case involves a *civil contempt order,* not a criminal contempt (R. II, p. 152).

Nor does the cited case contain any reference to *remedial action* in the manner set forth by respondent (Br. p. 5), the reference in question refers only to *punishment* (122 F.(2d) 819 at 824).

II.

An examination of *International Silver Co. v. Oneida Community,* 93 F.(2d) 437, reveals that the order in that case was in fact as well as in law not a final order and the difference between the order in that case and the order in the instant case merely serves to emphasize the finality, for purposes of appeal, of the order in the instant case.

The full quotation from the cited case of which respondent gave only a part, reads as follows:

> "It did no more than to interpret the prior injunction *and to direct proceedings by way of a reference which might ultimately result in some direction to pay damages.*" (93 F.(2d) 437 at 441).

In the instant case the order appealed from specifically ordered petitioners to refund considerable sums of money to tenants (R. II, pp. 15-20, at p. 20). There is no lack of finality in the order of the court in this respect. *Berman v. U. S.*, 302 U.S. 211, cited in our Petition (p. 9).

III.

Much has been said concerning the fact that the district judge reserved the power to commit petitioners to jail if they failed or refused to comply with the substantive terms of the order. Obviously, this reservation of power to enforce the order does not in any way detract from the finality of the substantive provisions of the order. Petitioners do not appeal from that portion of the order which reserves power to enforce the order. Their appeal was directed against the substantive provisions of the order, which directed the refund of money and prohibited the collection of sums of money which were due under the contracts with the tenants and purchasers of furniture (R. II, pp. 133-136).

The fact that an assessment of costs in the amount of $500.00, was made and later remitted (R. II, pp. 20, 150), does not enter into the case so far as the appeal is concerned. No question concerning the assessment of costs has been raised on appeal. It is obvious that the references made to this assessment and the references made to the power reserved to enforce the order, have only served to confuse and becloud the real issues in the case (see Brief for Respondent, pp. 5-6).

It would appear from the Argument of respondent (Br. for Respondent, p. 5), that it is respondent's con-

tention that the reservation of power to enforce the order by committing petitioners to jail in and of itself prevents an appeal from the substantive portions of the order unless and until petitioners, by refusing to obey the order, are actually ordered or committed to jail. This is a contention not supported by the authority cited, and one with which we are sure this Honorable Court will not agree. Under this theory of law an appeal in a civil contempt case could be deterred or made most perilous by the judge issuing the original civil contempt order. Is it not apparent that if to obtain a review of a civil contempt order the contemnor must deliberately refuse to obey said order and be committed to jail, that what commenced as a civil contempt would most likely end as a criminal contempt of a most serious nature?

CONCLUSION

In actuality, respondent seeks to sustain the decision of the court below on a theory of law which was not advanced by the circuit court in its own opinion, and we have shown respondent's theory to be erroneous and not supported by the cases cited.

As set forth in our Petition (p. 3) the circuit court based its ruling upon the proposition that:

> "A remedial or civil contempt order directed against a party litigant is deemed interlocutory and not a final order, and is reviewable only on appeal from the final decree in the main action. * * * The judgment of contempt was remedial, therefore civil and interlocutory, and not final for the purposes of appeal to this court." (Tr. Vol. II, pp. 151-152.)

Respondent has not attempted to support this proposition of law, supra, and in fact it would appear that respondent has in effect admitted the above to be erroneous in his concession on page 4 and his note (2) at bottom of page 5, of the Brief in Opposition. In any event respondent has failed to answer the facts, argument and cases cited by petitioners, which show the decision below to be erroneous and in conflict with applicable decisions.

Wherefore, it is respectfully submitted that the writ should be granted.

April, 1946.

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